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MSHA V. FIFE ROCK PRODUCTS
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FMSHRC-WDC
OCT 14, 1986

SECRETARY OF LABOR,
MINE SAFETY AND HEALTH
ADMINISTRATION (MSHA)

v. Docket No. WEST 85-141-M

FIFE ROCK PRODUCTS COMPANY,
INCORPORATED

BEFORE: Ford, Chairman; Doyle and Lastowka, Commissioners

ORDER

BY THE COMMISSION:

In this civil penalty proceeding arising under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq (1982), Commission Administrative Law Judge John J. Morris issued a decision on September 15, 1986, finding Fife Rock Products Co., Inc. ("Fife") in default, affirming a citation issued for an alleged violation of 30 C.F.R. § 56.5-7 (1984), and assessing a civil penalty of \$600. After the judge's decision was issued, Fife filed with the judge a request that the decision be stayed and the matter be reheard. We deem Fife's request to constitute a petition for discretionary review which we hereby grant. For the reasons that follow, we vacate the judge's decision, and remand for further proceedings.

The case commenced when the Secretary of Labor filed a Proposal for Penalty proposing that Fife be assessed a civil penalty of \$600 for an alleged violation of section 56.5-7. The matter was assigned to Judge Morris. After unsuccessful settlement negotiations between the Secretary and Fife, the judge issued a Notice of Hearing on June 2, 1986, setting a hearing for August 12, 1986, in Salt lake City, Utah. When Fife did not attend the hearing, the judge orally found Fife in default and assessed a penalty of \$600

for the violation. In his written decision of September 15, 1986, the judge confirmed his entry of default and his penalty assessment. Subsequently, on September 22, 1986, Clifford P. Woodward, Fife's General Manager, sent to Judge Morris a letter that stated in part: "Having received a copy of your 'Decision and Order' dated September 15, 1986, it is apparent to us that we were not aware of

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the hearing set for August 12, 1986." Fife requested that "the decision ... be stayed and that all parties ... be heard through a rehearing of the case." By letter dated September 25, 1986, Judge Morris informed Fife that his jurisdiction had terminated and forwarded Fife's request to the Commission. Fife's letter was received by the Commission's Docket Office on September 29, 1986.

The judge correctly indicated that his jurisdiction in this matter terminated when his decision was issued on September 15, 1986. 29 C.F.R. § 2700.65(c). The Commission has observed repeatedly that default is a harsh remedy and that if a defaulting party can make a showing of adequate or good cause for a failure to respond to an order or notice, the failure may be excused and appropriate proceedings on the merits permitted. See *M.M. Sundt Construction Co.*, 8 FMSHRC , No. CENT 86-6-M, slip op. at 3. (September 15, 1986), and authorities cited. Fife has alleged that it did not receive the judge's June 23, 1986 notice of hearing and was unaware of the August 12, 1986 hearing. 1/ Fife is also proceeding without benefit of counsel. We conclude that in the interest of justice, Fife should have the opportunity to present its position to the judge. *M.M. Sundt*, supra, slip op. at 2-3.

1/ The June 2, 1986 notice of hearing claimed not to have been received appears to have been mailed to the parties by regular first class mail. The Commission's procedural rules do not mandate service of a notice of hearing by registered or certified mail, return receipt requested. However, in view of the recent questions raised both here and in *M.M. Sundt Construction Co.*, regarding whether proper service has occurred, the Commission's judges should consider the advisability of serving notices of hearing and orders to show cause issued pursuant to Commission Procedural Rule 63(a), 29 C.F.R. § 2700.63(a), either by registered or certified mail, return receipt requested, or by both regular first class mail and registered or certified mail, return receipt requested.

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Accordingly, the judge's decision is vacated and this matter is remanded for further proceedings consistent with this order. 2/

Ford B. Ford, Chairman

Joyce A. Doyle, Commissioner

James A. Lastowka, Commissioner

2/ Pursuant to section 113(c) of the Mine Act, 30 U.S.C. § 823(c), we have designated ourselves a panel of three members to exercise the powers of the Commission in this matter. Further, Fife is reminded to serve the Secretary with copies of all its correspondence and other filings in this matter. 29 C.F.R. § 2700.7.

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Distribution

Clifford P. Woodland, Gen. Mgr.
Fife Rock Products Co.
P.O. Box 479
Brigham City, Utah 84302

Margaret A. Miller, Esq.
Office of the Solicitor
U.S. Department of Labor
1585 Federal Bldg.
1961 Stout St.
Denver, Colorado 80294

Ann Rosenthal, Esq.
Office of the Solicitor
U.S. Department of Labor
4015 Wilson Blvd.
Arlington, VA 22203

Administrative Law Judge John Morris
Federal Mine Safety and Health Review Commission
333 West Colfax Avenue, Suite 400
Denver, Colorado 80204